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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHAEL J. KARR, et al., Plaintiffs and Appellants, v. STATEWIDE ENTERPRISES, INC., Defendant and Respondent.	B245147 (Los Angeles County Super. Ct. No. BC454627)

APPEAL from an order of the Superior Court of Los Angeles County. Frederick C. Shaller, Judge. Affirmed.

Stearns Kim & Stearns, Lawrence P. Bemis, Ryan E. Stearns and Chloe Wolman for Plaintiffs and Appellants.

Bremer Whyte Brown & O'Meara, Matthew Gutierrez and Joshua Bordin-Wosk for Defendant and Respondent.

SUMMARY

Plaintiffs Michael J. Karr and Erika N. Ewing ("Appellants") appeal from a trial court order denying their motion for contractual attorney fees from Statewide Enterprises, Inc. ("Statewide") based on a settlement agreement, Civil Code section 1717 and rule 3.1702 of the Rules of Court. Because Appellants' motion to vacate did not seek to enforce or interpret the settlement agreement, we affirm the order.

BACKGROUND

In February 2011, Appellants filed a complaint alleging harassment, assault and battery by Randy D. Patman,[1] the residential property manager of their apartment building. The complaint alleged that Statewide managed the apartment building and Patman was Statewide's employee and agent.

Almost a year later, the action was apparently settled. In a written Release and Settlement Agreement (the "Agreement") executed by Appellants on January 29, 2012, Appellants agreed to dismiss all defendants, including Statewide, "from the entire action with prejudice" in return for a payment of $75,000 to be divided equally between Karr and Ewing. The Agreement provided that it could be executed in counterparts but no copy of the execution by Statewide is included in the record.[2]

The Agreement also stated, "[i]n the event legal action is commenced to enforce or interpret this Agreement, or if a declaratory relief action is brought with respect to any issue concerning the agreement, the prevailing party in such action shall be entitled to recover from the losing party reasonable attorneys' fees and costs incurred by the prevailing party in such action." In addition, the Agreement stated that "[t]he court reserves jurisdiction to enforce the terms and conditions of the settlement pursuant to Code of Civil Procedure 664.6 upon noticed motion of any party."

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[1] Patman and the owner of the building, Vista Investment Group, LLC, were defendants in the trial court but are not parties to this appeal.

[2] Only Appellants' and their counsel's signatures are in the record.

The Agreement also provided that "[c]oncurrent with the execution of this release, counsel for plaintiffs shall execute and file with the court a dismissal, with prejudice, of all claims against defendant [*sic*]. In doing so, counsel for [appellants] will provide an executed and conformed copy of the dismissal to counsel for defendants." Despite this provision, no notice of dismissal was filed with the trial court at the time the Agreement was executed by Appellants on January 29, 2012.

On February 3, 2012, the trial court's research attorney emailed Statewide's counsel (Matthew Gutierrez) and Appellants' counsel (Lawrence Bemis) about Statewide's motion for summary judgment previously calendared for February 9, 2012 and asking parties to provide an electronic copy of their Separate Statement of Facts in support or opposition to the motion. What followed was a series of email exchanges amongst counsel.

Bemis emailed Gutierrez, copying Patman's counsel (Bernhard Bihr), on February 6, 2012 asking if he was "responding to this in light of the settlement, which remains contingent upon receipt of the checks from [the insurance company]? The [appellants] have executed all the required documentation and delivered to Mr. Bihr," who apparently was coordinating the exchange of documents and payments. Gutierrez replied, "Yes I have replied to [the trial court's research attorney] with an e-copy of the separate statement of undisputed material facts. Please let me know if you would like a copy as well." Bemis then emailed Bihr, asking "what is going on? Somebody on the defense side needs to tell the court the case is settled and the court does not need to be preparing for a MSJ hearing. Am I missing something?" Bihr replied the next day, February 7, 2012, copying Gutierrez and telling Bemis "[y]ou need to file and serve the notice of settlement of the entire case. I received the settlement checks late yesterday. Do you want to have someone pick them up or should I put them in the mail?" and telling Gutierrez and counsel for Vista in the same email "I have the original executed settlement agreement and dismissal with prejudice of the complaint. Someone should advise the

court to take the MSJ off calendar."[3] Bemis then responded to Bihr, copying one of the Appellants, to arrange pick up of the check and stating that Bemis would "file today a Notice of Settlement and once the checks have cleared I will so advise you and you can file the Notice of Dismissal, which you have in hand" and concluded by stating "I am relying on defendants to take [*sic*] notify the court that the Feb 9 hearing is off calendar." Later in the exchange, Bihr emailed Bemis and copied Gutierrez, stating that Gutierrez had advised Bihr that Appellants' "motions to compel are still on calendar. Could you please take them off." The next day, February 8, 2012, Gutierrez emailed Bemis and Bihr,[4] quoting the section of the Agreement requiring Appellants' counsel to execute and file a dismissal with the court concurrently with the execution of the release and Gutierrez's understanding that this had not been done. Gutierrez then stated "[a]s such, we are keeping our motion for summary judgment on calendar. We will advise the court at tomorrow's hearing that the case is settled pending filing of the request for order of dismissal." Vista's counsel then emailed, "I trust that this will not be an impediment to the disposition of the case as we have already taken our motion off calendar. If need be, we will amend our answer to assert the release as an affirmative defense. Mr. Bemis please advise." Bihr then emailed to clarify "[j]ust so everyone is on the same page: I agreed with Mr. Bemis that I would not file the dismissal until he advised me that the settlement checks had cleared" which was expected no later than the end of the week. Bemis then emailed to advise that the checks had been deposited and that "Mr. Bihr is hold [*sic*] the executed Notice of Dismissal. I will notify him as soon as the checks clear and he can then file the notice of dismissal. I have already filed the Notice of Settlement."

Appellants' Notice of Settlement of Entire Case was filed on February 8, 2012.

On February 9, 2012, Statewide's counsel, Gutierrez, made an appearance via court call at the hearing on the motion for summary judgment. No other counsel

[3] Also copied was counsel for defendant Vista.

[4] Counsel for defendant Vista was copied on the email.

appeared. The court noted that no opposition has been filed, granted the motion for summary judgment and asked Statewide's counsel to prepare a judgment for the court's signature. The court made no mention of the filing of the Notice of Settlement or settlement generally, and apparently was unaware that the case had been settled. Gutierrez agreed to prepare a judgment as requested by the court. Gutierrez did not raise to the court that the case had been settled or the fact that a Notice of Settlement had been filed the day before.

The next day, February 10, 2012, Statewide filed a notice of ruling on the summary judgment motion.

On February 22, 2012, Appellants' Request and Entry of Dismissal with prejudice was filed. The trial court's docket indicates that on February 27, 2012, the case was "Dismissed" or "Dismissed/Disposed."

Nonetheless, on March 8, 2012, Statewide filed a declaration in support of the "Proposed Judgment on the Unopposed Motion for Summary Judgment and Summarizing Responses to Proposed Judgment." In the declaration, Gutierrez stated that in his email of February 8, 2012 to Bemis, "I advised that my office would inform the Court that the case was tentatively settled; however, after I made that provisional comment at 12:24 p.m., I subsequently received Mr. Bemis' 3:25 p.m. e-mail negating the need to do so" as Bemis stated that he had already filed the Notice of Settlement. Thus, according to Gutierrez's declaration, "my office opined that it was no longer necessary to orally advise the Court." The declaration also summarized that Appellants had served a Notice of Objection to the Proposed Judgment and a Request for Sanctions arguing that Statewide should have told the trial court that the case had been settled.

On March 19, 2012, the trial court signed the proposed judgment granting Statewide's summary judgment motion.

On April 2, 2012, Appellants filed a motion to vacate the judgment pursuant to Code of Civil Procedure section 663. Statewide opposed the motion.

At the May 29, 2012 hearing on the motion to vacate, the trial court stated that the "the court should have taken [Statewide's summary judgment motion] off calendar. The

court was notified the day before that a settlement had been entered, it didn't register. The court's legal assistant had received an e-mail two days before saying the case is settled. [¶] So the case should never have been heard. So I am setting aside both the granting of the motion for summary judgment and the judgment."

On June 11, 2012, the trial court signed an order adopting its tentative ruling as final. The court's ruling noted the court's mistake in failing to take the summary judgment motion off calendar after receiving notice of the settlement, but also noted that Statewide "took advantage of the court's ignorance/mistake and failed to advise the court of the settlement, even though it advised [Appellants] it would do so."

On August 9, 2012, Appellants filed a motion for attorney fees pursuant to Civil Code section 1717 and California Rules of Court, rule 3.1702 for enforcing the parties Agreement.[5] On October 3, 2012, the trial court denied Appellant's motion for attorney fees. At the hearing, the trial court reasoned that the attorney fees provision of the Agreement was limited to actions to "enforce or interpret the Agreement" and the motion to vacate was "based on facts extrinsic to the settlement agreement. It was based on mistake." The trial court noted that its ruling to vacate the judgment was not based on Code of Civil Procedure section 664.6 but on sections 663 and 128. The trial court also noted that some of Appellants' arguments were more appropriate for a Code of Civil Procedure section 128.7 motion, instead of a motion for attorney fees under the Agreement, and stated, "I'm going to deny your motion without prejudice to making a [Code of Civil Procedure, section] 128.7 motion."[6]

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[5] Statewide filed late an opposition to the motion for attorney fees, but the trial court deemed it untimely and did not consider it.

[6] Appellants' counsel indicated to the trial court that he would file a motion under section 128.7, but did not do so. Section 128.7 of the Code of Civil Procedure provides for the award of sanctions for actions violating specific conditions. Although the section authorizes a court, on its own motion, to enter an order to show cause why a violation has not occurred (Code Civ. Proc., § 128.7, subd. (c)(2)), the trial court here apparently declined to do so.

In its written ruling, the trial court further explained that Appellants' motion to vacate under Code of Civil Procedure section 663 did not seek to enforce or interpret that Agreement, "which had already been satisfied. Rather, [Appellants] sought to vacate a judgment erroneously entered against [Appellants] after summary judgment was granted because of [Statewide's] conduct in failing to tell the court the action had settled."

Appellants filed a notice of appeal on November 14, 2012.

DISCUSSION

On appeal, Appellants contend, inter alia, the trial court erred in denying their motion for attorney fees based on the Agreement because section 1717 of the Civil Code makes prevailing party attorney fees clauses in contracts enforceable, Appellants were a prevailing party, and the trial court retained jurisdiction under the Agreement and section 664.6 of the Code of Civil Procedure.

We affirm.

"Orders denying or granting an award of attorney fees are . . . generally reviewed using an abuse of discretion standard of review. [Citation.] But a 'determination of whether the criteria for an award of attorney fees and costs have been met is a question of law.' [Citation.]" (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.)

Section 1717 of the Civil Code provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).) Code of Civil Procedure section 664.6 in turn provides that "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, . . . the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over

the parties to enforce the settlement until performance in full of the terms of the settlement." As courts have explained, "[b]ecause of its summary nature, strict compliance with the requirements of section 664.6 is prerequisite to invoking the power of the court to impose a settlement agreement." (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1256, quoting *Sully-Miller Contracting Co. v. Gledson/Cashman Construction, Inc.* (2002) 103 Cal.App.4th 30, 37.) In other words, the statute "require[s] the signatures of the parties seeking to enforce the agreement under section 664.6 and against whom the agreement is sought to be enforced." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 305.) Because Statewide's signature is, on the current record, missing, the summary procedure of section 664.6 was unavailable to enforce the Agreement.

Even assuming section 664.6's procedure had been available to Appellants, we agree with the trial court that Appellants' motion to vacate the judgment was not a motion to enforce or interpret the Agreement. Here, the Agreement provided that "[i]n the event legal action is commenced to enforce or interpret this Agreement, or if a declaratory relief action is brought with respect to any issue concerning the agreement, the prevailing party in such action shall be entitled to recover from the losing party reasonable attorneys' fees and costs incurred by the prevailing party in such action." This language is less broad than fee provisions extending to disputes "arising out of the contract" or "in connection with this agreement." (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2013) ¶ 1:228, p. 1-45, citations omitted.) Moreover, at least one court has interpreted narrowly similar language providing for attorney fees when a party "brings an action to enforce the contract." (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 744.) We agree with the trial court that Appellants' motion to vacate the judgment was neither an "action commenced to enforce or interpret" the Agreement nor a declaratory relief action. Accordingly, we affirm.

Our affirmance should not be interpreted as condoning or ignoring the misleading conduct of Statewide's counsel in choosing not to inform the trial court of the settlement during the summary judgment hearing and submitting a proposed judgment on the motion for summary judgment after the executed dismissal was filed, and then opposing

Appellants' motion to vacate the judgment erroneously signed by the trial court. Attorneys may not ". . . mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068, subd. (d).) "[A]n attorney '". . . owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice. His high vocation is to correctly inform the court upon the law and the facts of the case, and to aid it in doing justice and arriving at correct conclusions. He violates his oath of office when he resorts to deception or permits his clients to do so."' [Citation.]" (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1261–1262.)

DISPOSITION

The order is affirmed. Each party to bear its own costs.

The clerk of this Court is ordered to send a copy of this opinion to the California State Bar for consideration of discipline. We express no opinion on what discipline, if any, should be imposed on Gutierrez or any supervising attorney at his firm Bremer Whyte Brown & O'Meara.

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CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.